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Thomas I. Vanaskie

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THE INDEPENDENCE AND RESPONSIBILITY OF THE FEDERAL JUDICIARY

THOMAS I. VANASKIE*

"To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."

-Thomas Jefferson¹

I. INTRODUCTION

Thomas Jefferson's sentiment reflects a concern for the potential usurpation of power inherent in a branch of the national government independent of democratically established executive and legislative hegemony. And yet, it is unbridled executive and legislative authority that threatens to overwhelm the constitutional limits of power, as well as the individual rights proclaimed as "self-evident" in the Declaration of Independence and assured by the Bill of Rights. Thus, there exists an inherent tension in assigning to the judicial branch of government the final say as to the constitutionality of legislative and executive actions. The judiciary cannot be so independent that it becomes a despotic oligarchy, but it must be sufficiently independent of the legislature and the executive that it remains, in James Madison's words, an "impenetrable bulwark" both against the exercise of authority not delegated to the other branches of national government or reserved to the states, as well as against unwarranted encroachments on individual rights.²

* Chief Judge, United States District Court for the Middle District of Pennsylvania; B.A., 1975, Lycoming College; J.D., 1978, Dickinson School of Law.

1. 15 THE WRITINGS OF THOMAS JEFFERSON 277 (Lipsomb & Bergh eds., Memorial Ed. 1903-04), available at <http://etext.virginia.edu/jefferson/quotations/jeff1030.htm> (quoting statement made by Thomas Jefferson to William C. Jarvis in 1820).

2. See 1 ANNALS OF CONGRESS 439 (Joseph Gales ed., 1789) (quoting James Madison's statement that addition of national judiciary would safeguard against abuse of power by any single branch of national government).

That the judiciary has attained the degree of institutional independence deemed by some to be “perhaps the most essential characteristic of a free society”³ is suggested by the fact that the Supreme Court was acknowledged to have the authority to serve as the final arbiter of issues determinative of the 2000 presidential election. The federal judiciary has thus evolved from an institution bemoaned by its first Chief Justice, John Jay, as lacking both the “energy, weight and dignity,” as well as “the public confidence and respect” essential to perform its role in the national government,⁴ to the one branch of national government with the stature and security necessary to render a decision that would be accepted by the Nation as final resolution of the election controversy.

It is, however, the content of the majority ruling in *Bush v. Gore*⁵ that has caused some to suggest that the decision portends a diminution in the Court’s stature and an erosion in the independence of the federal judiciary. Criticism of the decision has focused on what is perceived to be the absence of coherent reasoning and the departure of the *Bush v. Gore* majority from the positions they previously held on matters of states’ rights and equal protection.⁶ As one commentator has noted, “[t]he Court’s unique treatment of both the federal question and its application of the Equal Protection Clause makes it difficult to conclude that the decision resulted from a dispassionate application of generally accepted legal principles, and highlights the difference between playing lip service to [S]tates’ rights and judicial restraint and actually applying those principles.”⁷

This criticism reflects a recognition that to maintain not only its stature, but also, more importantly, its independence, the judiciary must adhere to the discipline of judicial decision-making, firmly rooting rulings in the language of the documents in issue, precedent and logic. That is, the strength of the judiciary’s independence depends not only on the constitutional framework, but also on the extent to which the judiciary acknowledges its responsibility to “decide ‘according to law,’ according to a continuity of reasoned principle found in the words of the Constitution, statute, or other controlling instrument, in the implications of its structure

3. S. Irvin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 121 (1970).

4. Randolph J. May, *Better Than Nothing: Why the Judiciary Is Finally Getting the Respect It Deserves*, 112 FULTON COUNTY DAILY REP. 6 (2001) (noting that John Jay declined second term as Chief Justice because judiciary, at that time, lacked weight and dignity it needed to be successful).

5. 571 U.S. 98 (2000).

6. See, e.g., Nathaniel Hernandez, *Trial Lawyers and Profs Issue Split Opinion on Federal Election Ruling*, 24 CHI. LAW. 8, 8-9, 20 (2001) (noting various criticisms, including characterization of ruling as “driven by political concerns rather than legal concerns”).

7. Clifford B. Levine, *Bush v. Gore, Who Exactly Was the Supreme Court Protecting?*, LAWS. J., Jan. 12, 2001, at 8.

and apparent purposes, and in prior judicial precedents, traditional understanding, and like sources of law.”⁸

This Article, based on remarks I made at Lycoming College in April of 2000, will: (1) examine the historical basis for an independent judiciary; (2) explore the provisions of the United States Constitution intended to establish an independent third branch of government and, at the same time, serve as a check on that independence; (3) discuss early challenges to the autonomy of the federal judiciary and the enduring significance of the results of those challenges; and (4) review current assaults on the independence of the federal judiciary. Although Congress and the President must assume responsibility to preserve an independent judiciary by, for example, avoiding calls for impeachment of judges because of particular decisions, decreeing results in particular controversies, and blocking cost of living adjustments for judges, the judiciary must also accept its responsibility by deciding “according to law,” with a healthy respect for the policy prerogatives of the legislative and executive branches and an equally healthy skepticism of the notion that a judge or group of judges can know what is best on matters of public policy.⁹

II. THE HISTORICAL FOUNDATION FOR AN INDEPENDENT JUDICIARY

In 1215, the Magna Carta advanced the revolutionary principle that the populace should be subject to the rule of law, not to the whim of the ruler.¹⁰ Even the ruler was to be subject to the law.

As Professor Cox relates, when King James IV of Scotland ascended to the throne of England and became King James the First, he brought with him the divine right theory of governance, by which the King was regarded

8. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996).

9. Most of my remarks at Lycoming College in April 2000 concerned the federal judiciary, and this article will not deviate from that approach. But judicial independence is equally important, if not more so, for the judiciary of our nation's sovereign states. State judges in forty-seven of the fifty states are subject to an electoral process that poses threats to independence which we in the federal judiciary need not confront. These threats include such matters as the need to raise substantial sums of money to be elected and to stand for retention. Amassing campaign treasuries casts doubt on the appearance of impartiality that is essential to maintaining public respect for the judge's decisions. In addition, the electoral process imposes pressures upon a state court judge to conform his or her decisions to the popular view or risk removal from office in the next election. Conversely, if the judge rules in a way that is consistent with the popular view, he or she is subject to the criticism of the disappointed litigant that the decision was the product of this external factor. Although this Article focuses on the federal judiciary, I do not mean to suggest that the independence of the state judiciary is any less important or that the threats to the independence of the state judiciary are less substantial.

10. See Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 647 (1999).

as above the law.¹¹ When a question arose as to whether a lay court (the common pleas court) should decide whether an ecclesiastical court had jurisdiction over a particular matter, the Archbishop of Canterbury, the highest ecclesiastical officer next to the King, contended that the judges were merely subjects of the King, who could remove them at any time. This position was consistent with the divine right theory. Chief Justice Edward Coke had concluded otherwise, explaining that "the King in his own person cannot adjudge any case . . . but this ought to be determined and adjudged in some Court of Justice . . . so that the Court gives the judgment."¹² This position would make the judge, and not the King, the final arbiter of the law. When confronted by King James I, Chief Justice Coke is reported to have stated that "[t]he King should not be under man, but under God and the Law."¹³ King James, adhering to his view that he was above even the law, removed Lord Coke and other lay judges who would not yield to his position.

Professor Cox reports that under later Stuart Kings, the appointment and removal powers were used to enlist judges to successfully prosecute those who stood in opposition to the monarchy.¹⁴ He also reports that one of the causes of the "Glorious Revolution" of 1688 was the conduct of the monarchy in destroying the independence of the lay judiciary.¹⁵ The Glorious Revolution of 1688 produced the Act of Settlement of 1701. This document stipulated that a judge shall serve "as long as he shall behave himself well."¹⁶ There was thus established the principle of lifetime tenure as a means of precluding the executive from filling and eliminating judicial posts to ensure a view sympathetic with the monarch.

Indeed, lack of lifetime tenure for colonial judges was an important factor in the American Revolution. Although judges in England during this period served so long as they behaved themselves, colonial judges were subject to removal at the insistence of the King, who did not hesitate to exercise this authority to keep the colonists in line.¹⁷ Among the Declaration of Independence's litany of grievances was that the King had "made judges dependent on his will alone, for the tenure of their offices, and the

11. See Cox, *supra* note 8, at 568 nn.3-4 (noting that King James practiced divine rights of kingship where judges were his agents and he could withdraw cases from them at any time).

12. *Id.* at 569 n.5 (quoting *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1342 (K.B. 1607)).

13. *Id.* at 569 (quoting *Prohibitions Del Roy*, 77 Eng. Rep. at 1343).

14. See *id.* at 569 n.10.

15. See *id.* (citing 7 EDWARD FOSS, JUDGES OF ENGLAND 200-01 (1966)).

16. *Id.* at 570 n.12 (citing Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 47 (1995)) (quoting The Act of Settlement, 12 & 13 Will. 2, c. 2, § 3 (1700) (Eng.)).

17. See *id.* at 570 n.13 (noting that King George retained and did exercise authority to remove judges); see also Joseph R. Grodin, *Developing a Consensus of Restraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1970 (1988) (same).

amount and payment of their salaries.”¹⁸ Thus, an independent judiciary, free of executive oppression, was regarded by the American revolutionaries as essential to a free society.

The need for an independent judiciary was reinforced by the experience under the Articles of Confederation. The initial concept had been that democratically elected legislatures would control the judiciaries of each state. Having judges independent from the people was deemed inimical to the democratic spirit of the American Revolution, but the absence of restraint on legislative control over the judiciary was soon recognized to be a greater problem. As reported by Stephen Burbank:

[A] decade of experience under the state constitutions . . . expose[d] [a] triple danger[:] . . . first, that abuse of legislative power was more ominous than arbitrary acts of the executive; second, that the true problem of rights was less to protect the ruled from the rulers than to defend minorities and individuals against factious popular majorities acting through government; and third, that agencies of central government were less dangerous than state and local despotisms.¹⁹

Burbank further observed that Alexander Hamilton and James Madison came to “a substantive conception of the judiciary as the third branch of government.”²⁰ Madison and Hamilton thought that the judiciary would be essential to maintain a separation of powers between the Legislature and the President.²¹

Even Jefferson appears to have been affected by the legislative usurpation of judicial power during the Articles of Confederation period. Although it is said that in 1777 Jefferson had remarked that “the judiciary should ‘be a mere machine’ for the legislature,”²² in 1784 he wrote:

[Under the Virginia constitution, t]he judiciary . . . members were left dependent on the legislature, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes . . . judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other

18. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

19. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 319 (1999) (quoting JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 290 (1996)).

20. *Id.* at 320 (quoting RAKOVE, *supra* note 19, at 299).

21. *See id.*

22. Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in A.B.A. COMM’N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, *AN INDEPENDENT JUDICIARY* app. A at 67, 69 (1997), available at <http://www.abanet.org/govaffairs/judiciary/rappa.html>.

branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy.²³

The concern expressed by Jefferson reflected views that had been stated earlier by John Adams and Montesquieu. The judicial power, said Adams, "ought to be distinct from both the legislative and executive, and independent upon both, so that it may be a check upon both."²⁴ That is, there must be "institutional" judicial independence. "Montesquieu observed [that] rendering judges independent of outside influence, would allow them to 'follow the letter of the law' in the course of trying the causes of individuals,"²⁵ that is, "decisional judicial independence."²⁶

III. THE CONSTITUTIONAL FRAMEWORK FOR AN INDEPENDENT FEDERAL JUDICIARY

Three provisions of Article III of the United States Constitution are generally regarded as the foundation for federal judicial independence in the United States. The first is the so-called vesting clause, which states that "[t]he judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."²⁷ The language of this section parallels that found in Section 1 of Article I—"all legislative [p]owers herein granted shall be vested in a Congress of the United States,"²⁸ and Section 1 of Article II—"the executive Power shall be vested in a president of the United States of America."²⁹ By this use of parallel expressions in each of the first three Articles of the Constitution, the Founding Fathers suggested that the three branches of the national government were to be co-equals.

The Constitution establishes only the Supreme Court of the United States, leaving the creation and organization of "inferior" federal courts to Congress. This arrangement has significant implications on the independence of the judiciary. The implications are best understood in the context of the Constitutional Convention debates surrounding the drafting of Article III.

The resolution establishing the federal judicial power originally provided simply that a national judiciary be established, without mentioning a supreme or lower courts.³⁰ This resolution was then amended to state,

23. *Id.* (quoting GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, 1776-1787, at 451 (1969) (quoting Thomas Jefferson)).

24. *Id.* at 68 (citing John Adams, *On Government*, in *THE WORKS OF JOHN ADAMS* 181, 198 (C. Adams ed., 4th ed. 1851-56)).

25. *Id.* at 68-69 (quoting C. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book X, sec. 6, at 152 (T. Nugent trans., 1949)).

26. *Id.* (citing Adams, *supra* note 24, at 198).

27. U.S. CONST. art. III, § 1.

28. U.S. CONST. art. I, § 1.

29. U.S. CONST. art. II, § 1.

30. See Geyh, *supra* note 22, at 73.

"Resolved that a National judiciary be established, to consist of one supreme tribunal and of one or more inferior tribunals."³¹ The Anti-Federalists objected to the amendment, arguing that "the State tribunals might and ought to be left in all cases to decide in the first instance," and that lower federal courts would make "an unnecessary encroachment on the jurisdiction [of the states]."³² The Anti-Federalist view initially prevailed. An amendment was then proposed, providing "that the National Legislature be empowered to institute inferior tribunals."³³ As reported by Charles Gardner Geyh, the notes of James Madison indicate that the delegates to the constitutional convention observed a distinction "between establishing such [lower] tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them."³⁴

This compromise, extending to Congress the discretionary authority to determine the structure and number of the "inferior courts" of the nation, has enabled Congress to control both the organization and, to some extent, the jurisdiction of the federal courts. As the United States Supreme Court has more than once stated:

[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this Court) *dependent for its distribution, organization, and . . . exercise, entirely upon the action of Congress*, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction . . . and of withholding jurisdiction from them in the exact degrees and character to which Congress may seem proper for the public good.³⁵

Exercise of judicial power by the federal judiciary is also constrained in large measure by the congressional determination of the kinds of cases that can be heard in federal court. Congressional control over the organization and jurisdiction of the federal courts impacts the federal judiciary's constitutional role as a check upon executive and legislative authority. In this respect, Congress's exercise of its constitutional prerogatives in the

31. *Id.* (quoting 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 104-05 (1937) (quoting notes of James Madison)).

32. *Id.* (quoting 3 FARRAND, *supra* note 31, at 104-05 (quoting notes of James Madison)).

33. *Id.*

34. *Id.*

35. *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (emphasis added) (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)); *see also* *Palmore v. United States*, 411 U.S. 389, 400-01 (1973) ("The decision with respect to [the creation of] federal courts, as well as the task of deciding their jurisdiction, was left to the discretion of Congress"); *Case of Sewing Mach. Co.*, 85 U.S. 553, 577-78 (1873) ("Federal judicial power, beyond all doubt, has its origin in the Constitution, *but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts . . . always have been, and of right must be the work of the Congress.*" (emphasis added)).

organization and jurisdiction of the federal courts impacts the judiciary's institutional independence.³⁶

The second provision essential to the establishment of federal judicial independence is the good behavior clause of Section 1 of Article III, which provides that "the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."³⁷ This provision has as its historical antecedents the Act of Settlement of 1701, the experience of the colonists under King George III, and the state legislatures' control of judiciaries under the Articles of Confederation. Hamilton, in *The Federalist No. 78*, argued that life tenure was essential to the institutional independence of the judiciary, stating:

If then the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration [life time tenure] will afford a strong argument for the permanent tenure of judicial officers, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.³⁸

The independence that comes with life tenure was, however, checked by congressional authority to remove judges. Initially, it was proposed that judges "may be removed by the Executive on the application [by] the Senate and House of Representatives."³⁹ This proposal was soundly rejected as it portended a repeat of the experience of legislative control of state judiciaries during the Articles of Confederation period.⁴⁰ In its stead, judges were made subject to the constitutional provision on impeachment of "all civil Officers of the United States" for "Treason, Bribery, or other high Crimes and Misdemeanors."⁴¹

The third provision key to federal judicial independence is the compensation clause of Section 1 of Article III of the Constitution, which provides that judges of the Supreme and inferior courts shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."⁴² Manipulation of judicial salaries had been a means to control the judiciary exercised by both kings and state legisla-

36. See Geyh, *supra* note 22, at 68 (noting that inquiry into judiciary's independence requires exploration beyond text of Article III, Section 1 of Constitution).

37. U.S. CONST. art. III, § 1.

38. THE FEDERALIST NO. 78, at 53 (Alexander Hamilton) (Edward Gaylord Bourne ed., 1937).

39. Geyh, *supra* note 22, at 70 (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428 (1937)).

40. See *id.* (quoting 2 FARRAND, *supra* note 39, at 428).

41. U.S. CONST. art. II, § 4.

42. U.S. CONST. art. III, § 1.

tures.⁴³ The power to determine one's wages was acknowledged to be a power to control. As Hamilton explained in *The Federalist No. 79*:

Next to the permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support. . . . A POWER OVER A MAN'S SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.⁴⁴

The ratification debates continued to reflect the division in position on the degree of independence to be accorded the national judiciary. The Anti-Federalists considered a judicial branch vested with the exclusive power to decide cases, assured of lifetime tenure and at least a fixed compensation, as a pernicious, anti-democratic instrument that could frustrate the will of the people. The Anti-Federalist papers asserted:

[J]udges under this system will be independent in the strict sense of the word. . . . [T]here is no power above them that can control their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.⁴⁵

In light of this, Anti-Federalists argued that "[i]f . . . the legislature pass any laws inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature,"⁴⁶ the democratically elected governing body. The Anti-Federalists also recognized the potential for the federal judiciary to overwhelm its state counterparts, proclaiming that Section 1 of Article III would enable "the courts appointed by this new-fangled Congress [to] eat up our courts . . ."⁴⁷ The Federalists countered these arguments by pointing out that the jurisdiction of the state courts was unaffected by the proposed Constitution; that lifetime tenure and assured compensation were essential to provide a judiciary with sufficient independence to oppose legislative and executive excesses, given the judicial branch's "lack of control over sword or purse;" and that the legislature's

43. See Geyh, *supra* note 22, at 72 (describing manipulation of salaries as "concrete, widely acknowledged problem").

44. THE FEDERALIST NO. 79, at 107 (Alexander Hamilton) (Edward Gaylord Bourne ed., 1937).

45. Geyh, *supra* note 22, at 75 (quoting Brutus, *The Power of the Judiciary* (Part I), Mar. 20, 1788, in THE ANTI-FEDERALIST PAPERS 222, 223-24 (Morton Borden ed., 1965)).

46. *Id.* at 76 (quoting Brutus, *supra* note 45, at 223-24).

47. *Id.* at 75 (quoting *Speech by Benjamin Gale*, in III DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 420, 428 (Nov. 12, 1787)).

power of impeachment protected against a judiciary usurping legislative or executive power.⁴⁸

As summarized by Geyh:

In the end, a study of the convention and ratification debates tells us that the framers intended for the judiciary to be one of three, coequal branches of government. It tells us that the founders gave federal judges life tenure and a salary that could not be diminished, to guarantee that the judiciary would have decisional and institutional independence. It tells us that the framers prized decisional and institutional independence, respectively, as means to ensure impartial judicial decision-making and to avoid over-concentrations of power in a single branch of government. Finally, it tells us that impeachment and removal was the primary check on judicial independence, and was thought to be an appropriate remedy for judicial usurpations of power and other political crimes.⁴⁹

IV. EARLY ATTACKS ON THE FEDERAL JUDICIARY'S INDEPENDENCE

One of the first acts of Congress after the national government was established in 1789 was enactment of legislation creating the national judiciary.⁵⁰ Under this legislation, the Supreme Court was assigned six justices. They were given circuit-riding responsibilities, meaning that they had to travel to various parts of the United States and sit as trial judges and judges of intermediate appeal.⁵¹ When decisions made by a Supreme Court justice as a trial judge reached the Supreme Court, that justice either had to disqualify himself or pass judgment upon his own work.⁵² The justices had complained about the circuit-riding responsibility.

In 1801, the lame duck President, John Adams, with a lame duck Federalist Congress, passed the Judiciary Act of 1801.⁵³ This legislation ended the circuit riding responsibilities for Supreme Court justices and created sixteen new circuit judge positions to assume the responsibilities previously discharged by the Supreme Court justices.⁵⁴ Jurisdiction of the circuit courts, as permitted by the Constitution, was extended to all cases arising under the Constitution, treaties or federal law, thus establishing a

48. *Id.* at 76-77.

49. *Id.* at 78.

50. See Judiciary Act of 1789, 1 Stat. 73 (repealed 1911) (establishing court with one Chief Justice and five Associate Justices, meeting two sessions annually and having thirteen judicial districts).

51. See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, at 33 WAKE FOREST L. REV. 219, 222 (1998).

52. See *id.* (describing judicial practice prior to Judiciary Act of 1801).

53. 2 Stat. 89 (repealed 1802).

54. See Currie, *supra* note 51, at 222.

comprehensive scheme for the adjudication of federal law issues.⁵⁵ It certainly seems like sensible legislation.⁵⁶ But the problem was that the lame duck Congress filled the sixteen new judgeships with Federalists.⁵⁷

Thomas Jefferson assumed the office of the Presidency in 1801. When Congress convened in December of 1801, Jefferson asked that it "consider whether the country really needed all those new judges," recognizing congressional control over the organization and structure of the federal judiciary.⁵⁸ In early 1802, legislation was introduced to repeal the Judiciary Act of 1801.⁵⁹ There ensued a vigorous debate over the constitutionality of the proposed repeal of the legislation, which would abolish courts established by that legislation and, in effect, remove judges from office notwithstanding the Constitution's guarantee of lifetime tenure. The repeal would also reinstate the Supreme Court Justices' circuit-riding responsibilities. The Jeffersonian Republicans, now in control of Congress, asserted that it had the same right to repeal the law establishing inferior courts that it had to repeal the law establishing post offices or the levying of taxes.⁶⁰ They asserted "an absolute, uncontrolled right to abolish all offices which have been created by Congress, when . . . those offices are unnecessary and are productive of a useless expense."⁶¹ This view prevailed by a slim margin in the Senate and the repeal legislation passed overwhelmingly in the House of Representatives.⁶² The sixteen newly appointed judges were effectively thrown out of office. A purge of the judiciary had been accomplished.

The constitutionality of the repeal legislation was never explicitly addressed by the federal courts.⁶³ In *Stuart v. Laird*,⁶⁴ the Court rejected a litigant's contention that Congress could not effect a transfer of a case by abolishing the court in which the action had been pending, observing:

Congress ha[s] constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to

55. See Judiciary Act of 1801, § 11 (creating jurisdiction for circuit courts over all crimes "cognizable under the authority of the United States").

56. See Currie, *supra* note 51, at 222 n.10 (suggesting that Judiciary Act had been considered "'one of the best and ablest measures ever devised' by the Federalists" (quoting 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 51, 53 (1919))).

57. See *id.* at 223.

58. *Id.*

59. See *id.* (noting that, four weeks after Congress first met in December 1801, legislation was introduced to repeal act).

60. See *id.* at 224 (noting that Jeffersonian Republicans argued that Congress was not required to establish lower federal courts).

61. Geyh, *supra* note 22, at 82 (quoting CHARLES S. HYNEMAN & GEORGE W. CAREY, *A SECOND FEDERALIST* 199 (1967) (quoting Representative Joseph Nicholson)).

62. See Currie, *supra* note 51, at 233.

63. See *id.* at 234; Geyh, *supra* note 22, at 82.

64. 5 U.S. (1 Cranch) 299 (1803).

transfer a cause from one such tribunal to another. In this last particular, there are no words in the Constitution to prohibit or restrain the exercise of legislative power.⁶⁵

The Court also rejected the contention that its members had “no right to sit as circuit judges, not being appointed as such”⁶⁶ Having acquiesced to circuit-riding before the enactment of the Judiciary Act of 1801, the Court conceded that the authority of Congress to require circuit-riding had effectively been established.⁶⁷ Thus, the Court acknowledged the constitutional authority of Congress to control the organization of the courts and, to some extent, the responsibilities of the members of the courts.

The repeal of the Judiciary Act of 1801 demonstrates the tenuous nature of the institutional independence of the federal judiciary. The fact that courts can be abolished without violating the lifetime tenure clause suggests a strong check on the exercise of judicial power.

In addition to exercising control over the judiciary by the authority to determine its structure and organization, Congress and President Jefferson also sought to exert their authority over the judiciary through the impeachment power. Although the most famous case dealt with the failed effort to remove Supreme Court Justice Samuel Chase, his impeachment was preceded by the impeachment and successful removal of federal Judge John Pickering of New Hampshire. Judge Pickering’s removal reflected the potential of the impeachment power as a means of removing members of the federal judiciary in the absence of criminal conduct.

Judge Pickering had, at one time, been regarded as one of New Hampshire’s most distinguished citizens. However, dementia and alcoholism rendered him a lamentable figure.⁶⁸ A group of citizens complained of his judicial behavior, and the House of Representatives voted to impeach him. There were four articles of impeachment, all of which concerned Judge Pickering’s handling of a particular case.⁶⁹ Allegedly Judge Pickering had released a ship to its owner although duties had not been paid, had acted without hearing all the evidence, had refused to permit an appeal, and had appeared on the bench in a state of intoxication, “profanely ‘invok[ing] the name of the Supreme Being,’” and committing other unspecified “‘high-crimes and misdemeanors.’”⁷⁰ However, Judge

65. *Id.* at 309.

66. *Id.*

67. *See id.* It should be noted that Chief Justice Marshall declined to participate in the decision, having tried the case in his circuit-riding capacity.

68. *See Currie, supra* note 51, at 238-39 (noting that old age had adversely affected Judge Pickering’s abilities as judge).

69. *See id.* at 239 (noting that, after an “embarrassing episode on the bench,” citizens complained to Jefferson about Pickering).

70. *Id.* at 240 (citing 13 ANNALS OF CONGRESS 319-22 (1804)).

Pickering was not accused of a particular criminal offense.⁷¹ The matter proceeded to the Senate. When it was moved that the question before the Senate was whether Judge Pickering was guilty of high crimes and misdemeanors, the Senate majority struck the reference to high crimes and misdemeanors. Instead, the Senators were simply asked whether Pickering was "guilty as charged."⁷² Over the vigorous objection of the Federalists that impeachment for incompetence was not authorized by the Constitution, the requisite two thirds vote of the Senators was mustered and Judge Pickering was removed.⁷³

Flush from having established a precedent to use the impeachment power to remove a judge on grounds of incompetence, the Jefferson Republicans, the day after Pickering's removal, voted to impeach Supreme Court Justice Samuel Chase.⁷⁴ The articles of impeachment contained eight counts, based upon remarks made by Justice Chase before two grand juries, and his handling of the trials of John Fries and James Callendar on grounds of violations of the Sedition Act.⁷⁵ Essentially, Justice Chase, an ardent Federalist, was charged with acting in disregard of the law and in a patently biased manner. As in the case of Judge Pickering, the crucial issue in the Justice Chase proceedings was whether the charged conduct fell within the impeachment authority for high crimes and misdemeanors.⁷⁶

There was at that time precedent in England that high crimes and misdemeanors included "maladministration" of offices of public trust.⁷⁷ The Founding Fathers, however, had specifically rejected the term maladministration precisely because it could be viewed as authorizing removal of

71. *See id.* at 240. It should be noted that, in accordance with authority granted by the Judiciary Act of 1801, Judge Pickering's duties had been assigned to another judge. *See id.* at 242 n.162. With the repeal of the Judiciary Act of 1801, however, Judge Pickering was returned to the bench. *See id.* at 242 n.163.

72. *Id.* at 243 (quoting 13 ANNALS OF CONGRESS 364 (1804)).

73. *See id.* at 244.

74. *See id.* at 249.

75. *See id.* at 250-51.

76. *See id.* at 252-54 (discussing "open debate" in Congress about exact meaning of "high crimes and misdemeanors"). Professor Raoul Berger has suggested that the charges against Justice Chase were indeed substantial and that he should have been removed. Professor Berger asserts:

Standing alone, erroneous rulings in the course of a trial merely constitute reversible error and of themselves furnish no grounds for impeachment. But when these rulings consistently run against the accused, when all doubts are resolved against him, when the rulings are illuminated by conduct that exhibits the judge's unflagging hostility to the accused, they go far to demonstrate that the judge, who before trial announced his determination to "punish" the accused, has bent every ruling to his preconceived design.

Id. at 257-58 (quoting RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 235 (1973)).

77. *See id.* at 247.

a judge at the pleasure of the Senate.⁷⁸ Thus, as Professor Currie has pointed out, “[t]o remove a judge even for errors so patent as to amount to maladministration would contradict the explicit intentions of the Framers.”⁷⁹ Ultimately, a number of Jeffersonian Republicans concurred with this position and refused to convict Chase.⁸⁰

Immediately following this failure to impeach a judge for his handling of some cases, constitutional amendments were introduced to lessen the consensus needed to remove judges. The proposed process would require only a simple majority vote of both houses of Congress.⁸¹ These proposed amendments did not receive substantial support.⁸²

The defeat of the attempt to remove Justice Chase established one of the most enduring principles of our governance: political differences are not grounds for removing a judge, and displeasure with a judge’s rulings in a particular case is no ground for impeachment.⁸³ Since that time, although impeachment has been threatened, it has never been used to retaliate against a judge for a particular decision or decisions.⁸⁴ This limitation

78. *See id.* at 253 (noting that Madison thought maladministration was too vague and would be equivalent to term at pleasure of Senate).

79. *Id.* at 255.

80. *See id.* at 258.

81. *See id.* at 258-59.

82. *See id.*

83. *See* William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 910 (1991) (discussing enduring effect of Chase trial). As Chief Justice Rehnquist has explained:

Had the outcome of the Chase trial in the Senate been different, the independence of the federal judiciary generally, and that of the Supreme Court more particularly, would have been threatened. All of the charges against Chase in connection with the Fries trial and the charge to the Baltimore grand jury, and most of the charges against him arising out of the Callendar trial, were based on his performance of judicial duties while on the bench. Had Chase been convicted, it would have been a relatively short step, though by no means an inevitable one, for Congress to use impeachment as a method of curbing judges whose rulings did not please the dominant viewpoint in that body. Chase’s acquittal shut the door on that possibility. Jefferson disgustingly referred to impeachment as a “scarecrow,” and from that time until the present, impeachment has been confined to charges of flagrant abuse of office—perjury, bribery, and the like—and not employed as a basis for challenging judicial rulings on legal issues.

Id.

84. *See, e.g.,* Stephen O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 716 n.118 (1999). In addition to the conviction of Judge Pickering, there have only been six other federal judges impeached, convicted and removed from office. In 1861, Tennessee District Judge West H. Humphreys was removed for inciting a rebellion against the nation; in 1912, Associate Judge Robert W. Archbald of the United States Commerce Court was removed on bribery charges; in 1936, Judge Halsted Ritter of the Southern District of Florida was removed for accepting kickbacks and tax evasion; in 1986, Nevada District Judge Harry E. Claiborne was removed for tax evasion that had resulted in a felony criminal conviction; in 1989, Judge Alcee Hastings of the Southern District of Florida was removed for perjury stemming from an indict-

on the impeachment power thus serves to assure both institutional independence—the ability of the judiciary to serve as a check on the powers of the executive and legislative branches—as well as decisional independence—the ability to decide a case without fear of political reprisal.

Executive and legislative assaults on judicial independence waxed and waned during the ensuing two centuries. One of the more famous examples was Franklin D. Roosevelt's so-called court-packing plan. Frustrated by an aging and very conservative Supreme Court majority that continually struck down New Deal legislation, President Roosevelt, on February 5, 1937, urged Congress to enact legislation to create one new judgeship for each judge who was more than seventy years old but refused to retire.⁸⁵ Six of the nine Supreme Court Justices were then more than seventy years old.⁸⁶ By having the ability to appoint six new Justices, Roosevelt could assure favorable rulings on his New Deal legislation. Although Roosevelt had enjoyed a landslide victory in the 1936 election, Congress soundly defeated the court-packing plan.⁸⁷

The overwhelming resistance to the court-packing plan reflected the strengthening of the independence of the federal judiciary from its fragile inception. By the mid-twentieth century, the American public considered the independence of the federal judiciary to be essential to preserving the rule of law. As Professor Cox has explained, underlying the opposition to Roosevelt's plan was "the American people's near religious attachment to constitutionalism and the Supreme Court and their intuitive realization that packing the court in order to reverse the course of the Court's decision, would not only destroy its independence, but erode the essence of constitutionalism."⁸⁸

V. THE VALUE OF JUDICIAL INDEPENDENCE

The independence of the federal judiciary is firmly entrenched in the culture of our national government and is regarded as serving several important purposes. First, independence of the federal judiciary insures that the third branch serves as a check on the executive and legislative branches. Initially conceived as essential to the maintenance of the rule of law over the excesses of the executive, judicial independence has assured that the country's supreme commander is not above the law. It was, after all, a federal district judge who compelled President Nixon to produce the

ment based on the solicitation of a bribe; and, also in 1989, Mississippi District Judge Walter L. Nixon was convicted for lying to a federal grand jury investigating bribery. *See id.*

85. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1023-24 (2000).

86. *See* Cox, *supra* note 8, at 578 n.50.

87. *See* Friedman, *supra* note 85, at 1023 n.5.

88. Cox, *supra* note 8, at 578.

Watergate tapes.⁸⁹ Professor Cox was fired as the Watergate special prosecutor after he signaled his intention to obtain a judicial ruling that Nixon was violating a court order by refusing to turn over the Watergate tapes.⁹⁰ Nixon, however, could take no such action with respect to Judge Sirica, who issued the order in question.

As the experience during the Articles of Confederation period demonstrated, oppressive conduct is not limited to the executive branch. It is therefore essential that the judiciary serve as a check on legislative excesses. As Alexander Hamilton expressed in *The Federalist* No. 78:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . which contains certain specified exceptions to the legislative authority Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.⁹¹

The doctrine of judicial review, established in *Marbury v. Madison*,⁹² affords to the courts the final say as to the constitutionality of particular legislation.⁹³ Only a truly independent judiciary can insure that Congress has acted in accordance with its limited powers, and not according to the views of particular interest groups or even the views of the majority of the population.

Second, judicial independence is also regarded as essential to preserve individual rights and liberties expressed in the Bill of Rights. James Madison, when introducing the Bill of Rights, argued the following:

[I]ndependent tribunals of justice will consider themselves in peculiar manner the guardians of those rights; they will be an im-

89. See *In re Subpoena to Nixon*, 360 F. Supp. 1, 13-14 (D.D.C.), *aff'd sub nom.*, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (ordering President Nixon to turn over Watergate tapes).

90. See *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 102 (1994) (depicting events that led to special prosecutor Cox's termination in conjunction with Watergate). Cox had been appointed by President Nixon to serve as special prosecutor to lead the Watergate investigations. See *id.* Nixon ordered the firing of Cox after Cox threatened to obtain a judicial ruling that the President was violating an Order of Court to deliver the infamous Watergate tapes. See *id.* Attorney General Elliot Richardson refused to carry out the order to fire Cox and, instead, resigned. See *id.* Cox was then fired by the Solicitor General, in his capacity as Acting Attorney General. See *id.* This incident came to be known as the "Saturday Night Massacre." See *id.*; *In re Olson*, 818 F.2d 34, 41-42 (D.C. Cir. 1987) (per curiam) (depicting events of "Watergate Scandal").

91. THE FEDERALIST NO. 78 at 100 (Alexander Hamilton) (Edward Gaylord Bourne ed., 1937).

92. 5 U.S. (1 Cranch) 137 (1803).

93. See *id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

penetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.⁹⁴

This view was eloquently reflected in a Supreme Court opinion striking down a West Virginia State Board of Education resolution requiring all teachers and students to participate in the pledge of allegiance.⁹⁵ The Supreme Court wrote:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials *and to establish them as legal principles to be applied by the courts*. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁹⁶

The notion that natural rights exist is a part of the fabric of our constitutionally limited democracy; maintaining that fabric is the judiciary's responsibility, not the prerogative of a legislative majority.

Former Justice Penny J. White of the Tennessee Supreme Court, who was effectively removed from office in a retention election that she lost because of particular decisions attributed to her, has cogently articulated the differences that we could expect in our present political and legal landscape if the Jefferson Republicans had prevailed in their assault on the federal judiciary's independence in the early 1800s:

No legislative acts would be subject to judicial review because Chief Justice Marshall would have minded the Jefferson administration, which characterized *Marbury v. Madison* as a brazen attempt by the judiciary to meddle unlawfully in the business of the executive. Poll taxes, literacy tests, loyalty oaths, political gerrymandering, segregated public accommodations, and lynchings would all have survived because the judiciary would have been powerless to question, let alone invalidate, the actions of the legislative or executive branches.

Judges, prosecutors, police officers, and defense attorneys would not have to worry about suppression motions; without judicial independence *Mapp v. Ohio* would never have been decided. Federal agents who violated the Constitution in their searches and seizures historically turned the evidence over to state courts, or helped state agents do the deed themselves, since the Bill of

94. 1 ANNALS OF CONGRESS 439 (Joseph Gales ed., 1789).

95. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943) (describing Board's resolution that considered refusal to salute flag to be act of insubordination).

96. *Id.* at 638 (emphasis added).

Rights only applied to federal government action. It certainly was unpopular, not the will of the people, for the 1961 Supreme Court to deem those rights, or at least those in the Fourth Amendment, equally applicable to the states.

Indigents would not have been given counsel except as provided by state law, because the 1963 decision of *Gideon v. Wainwright* would not have occurred. . . .

Additionally, there would be no hearings to determine the admissibility of confessions. We could return to circumstances such as those found in *Davis v. North Carolina* where officers prompted confessions by depriving suspects of food and water and forcing them to run shackled along side police cars. . . .

Many civil cases would be nonexistent, since legislatures would have subsumed many private and public corporations. Why? Because the public pressure against the decision reached in the 1819 case of *Dartmouth College v. Woodward* [which held that the states cannot renege on its contractual obligations] would have been great enough to deter the Supreme Court from enforcing the contract clause against state government. In fact, many historians suggest that in the absence of the *Dartmouth College* case from the Supreme Court waterfront, courts would barely have civil dockets because private business would have feared the encroachment of government and would not have dared to invest their capital to build and stimulate our economy.⁹⁷

Although Justice White's observations may have historical merit and emotional appeal, I believe that judicial independence should not be defended primarily on the content of particular decisions. After all, this independent federal judiciary, so articulately defended by Justice White, gave us such decisions as *Dred Scott v. Sanford*,⁹⁸ which refused to grant standing to African Americans in federal court.⁹⁹ It also produced the separate but equal doctrine of *Plessy v. Ferguson*¹⁰⁰ that validated segregation in this country for decades.¹⁰¹ Furthermore, from the early 1900s through 1936, this independent federal judiciary invalidated any legislation that sought to improve the conditions of labor and to stimulate the national economy.¹⁰²

97. Penny J. White, *An America Without Judicial Independence*, 80 JUDICATURE 174, 175-76 (1997).

98. 60 U.S. (19 How.) 393 (1856).

99. *See id.* at 410-27 (concluding that African Americans were not citizens under Constitution and, thus, could not sue in contract).

100. 163 U.S. 537 (1896).

101. *See id.* at 552 (upholding Louisiana law that required separate railroad cars for African Americans and whites).

102. *See* Thomas I. Vanaskie, Comment, *The State Sovereignty Doctrine Since National League of Cities v. Usery: A New Constitutional Interpretation Under the Commerce Clause*, 81 DICK. L. REV. 599, 601-03 (1977).

Now, I suppose one could argue that cases such as *Plessy* and *Dred Scott* reflect the weakness of judicial independence in the face of contrary public opinion. Certainly, the case could be made that judicial approval of the incarceration of Japanese Americans during World War II in isolation camps reflected acquiescence to the will of the overwhelming majority.¹⁰³ It could also be said that the change in position of Chief Justice Hughes and Justice Roberts, who joined Justices Brandeis, Stone and Cardozo to overrule existing precedent in order to sustain New Deal legislation in 1937, could be regarded as the product of the coercive influence of Roosevelt's court-packing plan.¹⁰⁴

The point is that judicial independence cannot be regarded as guaranteeing a result in a particular case that is best for the polity as a whole. There is no doctrine of judicial infallibility, hence decisions like *Plessy v. Ferguson* persist. The importance of judicial independence cannot be substantiated by the content of a judicial opinion or the wisdom of a particular ruling. Although proponents of court rulings that run against the tide of public opinion or majority may cite the decisions as proving the virtue of judicial independence, opponents of those decisions may cite them as examples of an oligarchical despotism which has no regard for democracy itself.

103. See *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (upholding confinement of Japanese-American citizens in concentration camps during World War II). The *Korematsu* decision has been criticized as "one of the Court's most embarrassing moments, and has been thoroughly repudiated by history." David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 343 (1994).

104. See Michael R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 102-03 (1983). Professor Belknap suggests the following:

Even before Roosevelt revealed his plan to pack the Supreme Court in early 1937, Chief Justice Hughes and Justice Roberts, who together held the balance of power on a divided bench, grasped this reality, ended their cooperation with the more conservative Justices Van Devanter, Sutherland, McReynolds, and Butler, and permanently aligned themselves with the Court's three liberals, Justice Brandeis, Stone, and Cardozo.

Id. at 102.

The change in position of Chief Justice Hughes and Justice Roberts is sometimes referred to as the "switch in time that saved nine." *Id.* at 102 n.247. The view that Chief Justice Hughes and Justice Roberts changed their position in response to Roosevelt's court-packing plan has been criticized as denying

the constitutional jurisprudence of the period any status as a mode of intellectual discourse having its own internal dynamic[,] . . . dismiss[ing] the efforts of the lawyers defending the constitutionality of New Deal initiatives as irrelevant and redundant[,] . . . depriv[ing] Hughes and Roberts of a substantial measure of intellectual integrity and personal dignity, and . . . suggest[ing] that sophisticated legal thinkers casually discarded a jurisprudential world view formed over the course of a lifetime simply because it became momentarily inconvenient politically.

Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 206 (1994).

Consider, for example, the criticism of Professor Lino Graglia in an article discussing judicial activism.¹⁰⁵ Professor Graglia has written that it is the “occupational disease of life-tenured federal judges” to “exaggerate their estimation of their own wisdom and goodness in comparison to that of others.”¹⁰⁶ Professor Graglia further asserts that, since the Warren Court of the 1950s and 1960s, “the nation has moved from the constitutional scheme to a system of government in accordance with the views of a small cultural and educational elite, many of whom take an adversarial position towards American traditions and institutions.”¹⁰⁷ Blame for this development is not attributed to the fact that our constitutional scheme places limits on democracy, but rather on judicial activism, which Graglia defines as “the practice by judges of disallowing policy choices by other government officials or institutions that the Constitution does not clearly prohibit.”¹⁰⁸ Graglia complains that the consequence of judicial activism has been to subject the American people to the “policy preferences of the cultural elite on the far left of the American political spectrum.”¹⁰⁹ Professor Graglia continues:

Whatever the policy issue—flag burning, prayer in the schools, aid to religious schools, pornography, capital punishment, criminal procedure, busing for school racial balance, and so on—the ACLU almost always is better off when the Supreme Court takes the issue out of the political process. The ACLU either obtains a policy decision unavailable in the political process because it is opposed by a majority of the American people, or is left with the status quo and the opportunity to try again in the Court on another day. For conservatives—people who would protect and preserve American traditional values and institutions—the situation is reversed; their best hope is not for a positive victory, for example, a ruling that the States must prohibit abortion, or must provide for prayer in the schools—but that the Justices can be induced to leave them free to continue to fight for these positions through the political process.¹¹⁰

Professor Graglia’s commentary harkens back to the vigorous debates over the doctrine of judicial review and judicial independence at the founding of the Republic, reflecting the tension that necessarily exists in a constitutional scheme that assigns to each branch of government a responsibility to act as a check on the others. No one branch is assured of the

105. See Lino A. Graglia, *It’s Not Constitutionalism, It’s Judicial Activism*, 19 HARV. J.L. & PUB. POL’Y 293, 294 (1996) (characterizing Supreme Court as “nine lawyers” that serve as “mouthpiece of cultural elite”).

106. *Id.* at 294.

107. *Id.*

108. *Id.* at 296.

109. *Id.* at 298.

110. *Id.*

ability to make the correct decision for society or even a decision that reflects the will of the majority, even assuming that the majority will can be ascertained with assurance. But each branch must act within the confines of its constitutionally assigned responsibilities. In this manner, the rule of law that undergirds the Constitution is preserved.

In other words, what is imperative is that the American people have confidence that each branch of government has retained the ability to serve as a check and balance on the others. If the legislative and executive branches could assure certain decisions by having the authority to remove judges, what confidence would the public have in the judiciary serving its constitutional role as a check on the excesses of those branches? Jefferson himself stated the following in 1776:

The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive and independent upon both, that so it may be a check upon both, as both should be checks upon that.¹¹¹

In this sense, therefore, institutional independence of the judiciary must be maintained, even if it produces decisions perceived as contrary to the majority will. Criticisms of judicial independence as producing anti-majoritarian rule ignore the fact that, at its inception and throughout its existence, there has been popular support for this necessary consequence of having three coequal branches of government. Roosevelt could not pack the Supreme Court with justices sympathetic to his view. Jefferson could not remove Justice Chase simply because Chase was an ardent Federalist who had allowed his political views to enter into his judicial role. Thus, while a given decision may be anti-majoritarian, the potential for anti-majoritarian decision has retained majority support.

Decisional independence is also crucial to maintaining the rule of law, which is premised on the notion that no person nor any group of persons is above the law. What confidence would there be in the judicial branch if a litigant were to bring a matter before a court with the understanding that a decision may be made, not on the basis of facts, law, precedent and logic, but instead on the basis of the external pressures that may be brought to bear by interest groups? Assurance that cases will be decided "according to law" must be maintained if we are to preserve the rule of law.

111. 1 THE PAPERS OF THOMAS JEFFERSON 410 (Julian P. Boyd ed., 1950), *available at* <http://etext.virginia.edu/jefferson/quotations/jeff1270.htm> (quoting statement made by Thomas Jefferson to George Wythe in 1776).

VI. THE JUDICIARY'S RESPONSIBILITY FOR JUDICIAL INDEPENDENCE

If, of course, judges are deciding cases in accordance with individual value preferences, then the rule of law is equally threatened. Judicial independence thus becomes an instrument, not of ensuring the rule of law, but of destroying it. As Professor Cox has observed, judicial independence, therefore, implies a reciprocal obligation on judges to decide in accordance with a continuing body of principles found in accepted sources of law.¹¹² To illustrate the proper regard for judicial restraint, Professor Cox relates a remark made to him by Learned Hand when Professor Cox was Judge Hand's law clerk:

"[T]o whom am I responsible?" No one can fire me, no one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can't make me decide as they wish. Everyone should be responsible to someone. "To whom am I responsible?" [Hand] then turned and pointed to the shelves of his library and said "To those books about us, that's to whom I am responsible."¹¹³

Does this mean that deciding "according to law" requires a slavish adherence to precedent? Absolutely not. What must be preserved, however, is a sense of continuity in the law. As Professor Cox notes, this can be accomplished by careful attention to the discipline of legal reasoning, by which a judge links a new development in the law to an inherited tradition.¹¹⁴ It is not a facile task, but one to which assiduous attention must be devoted. Deciding according to law implies an approach that by reason, attention to accumulated wisdom, and a sense of "justice [the judiciary] . . . evolve[s] the rules best suited to human needs and aspirations."¹¹⁵ There must be restraint, not only in the form of respect for existing precedent, but also in respect for the autonomy and the authority of the other branches of government. Such an approach, of course, is not intended to please a majority of the people a majority of the time. It is intended, however, to assure that decisions are not based upon personal values or preferences.

This approach must necessarily be demonstrated by the highest court in the land. In 1977, I wrote a law review article that suggested that Supreme Court decisions are "translative of the social philosophies, outlooks, and predilections of members of the bench."¹¹⁶ I drew this premise from a treatise that had been written forty years earlier, entitled

112. See Cox, *supra* note 8, at 566.

113. *Id.* at 583-84.

114. See *id.* at 566-67.

115. *Id.* at 584.

116. Vanaskie, *supra* note 102, at 599-600 (quoting EDWARD S. CORWIN, COURT OVER CONSTITUTION 96 (1938)).

Court over Constitution.¹¹⁷ This article examined how, in 1968, the Supreme Court upheld application of minimum wage and maximum hour requirements to state and local government employees, but was subsequently overruled eight years later, after Richard Nixon made four appointments to the Supreme Court.¹¹⁸

Contrary to the express holding of the 1968 decision, the majority of Justices in 1976 found that the Tenth Amendment's reservation of powers to the states precluded Congress from extending minimum wage and maximum hour requirements to state and local governments.¹¹⁹ In 1985, just nine years later, the Court overruled its 1976 decision in *Garcia v. San Antonio Metropolitan Transit Authority*.¹²⁰ The language of the Tenth Amendment, considered in all three cases, remained the same. The only thing that changed was the composition of the Court. Having three separate interpretations of the Tenth Amendment in a span of less than twenty years is at least suggestive of results that depend, not upon judicial decision-making, but rather on judicial value preferences. Such an approach is not consistent with the rule of law, which requires stability and fair notice of what the law is.¹²¹

117. EDWARD S. CORWIN, *COURT OVER CONSTITUTION* 96 (1938).

118. See *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968) (utilizing commerce clause to apply minimum wage and maximum hour requirements to states), *overruled by National League of Cities v. Usery*, 426 U.S. 833 (1976).

119. See *National League of Cities*, 426 U.S. at 855 (overruling *Wirtz*).

120. 469 U.S. 528, 546-47 (1985) (holding that determination of state immunity from federal regulation does not turn on judicial appraisal of whether particular governmental functions are "integral" or "traditional").

121. More recently, the Court has used principles of sovereign immunity, and not the Tenth Amendment, to invalidate congressional exclusion of labor, standards to state governments. For example, a closely divided Court ruled that the states sovereign immunity from suit in their own courts was beyond congressional power. See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (finding that Congress could not abrogate state immunity from private suit in their own courts in case involving overtime provisions of Fair Labor Standards Act of 1938). Thus, a Fair Labor Standards Act case against a state could not be maintained in state courts absent the state's consent. See *id.* at 757-58 (determining that Maine did not consent to suit and could not be sued in its own courts). This ruling followed *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), a five-to-four ruling which held that Congress lacked the power to abrogate the State's Eleventh Amendment immunity from suit in federal court. See *Seminole Tribe*, 517 U.S. at 76. Consistent with the rationale of these cases, the Court has held that states may not be sued in federal court for alleged violations of the Age Discrimination in Employment Act or the Americans with Disabilities Act. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 960 (2001) (resolving circuit split as to whether individual may sue state for money damages in federal court under ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (concluding that ADEA did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals). These decisions reflect the judicial review prerogative established by *Marbury v. Madison*, in which Chief Justice Marshall wrote:

So . . . if both the law and the [C]onstitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the [C]onstitution; or conformably to the [C]onstitution, disregarding the law; the [C]ourt must determine which of these conflicting

The Court's ability to adjust the line of demarcation between congressional and state authority is essential in a constitutional democracy of competing sovereignties. The ability of the Court to redraw the line from time to time reveals the strength of its independence. However, a constantly shifting line in the allocation of powers to the national and to the state governments has the potential to undermine that independence, especially to the extent that decisions do not reflect careful attention to the discipline of legal reasoning.¹²²

Of course, the judges of the inferior courts share the responsibility of acting according to law. In fact, because they are on the front lines of the justice system and have the duty to follow existing precedent, their obligation to act according to law is intensified. Their decisions are in the papers every day. Their rulings are exposed to public opinion and held up to public scrutiny as much as if not more so than the decisions of the Supreme Court. District and circuit judges must constantly adhere to their limited role, following precedent, not individual preference. As Learned Hand observed, it is not "desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."¹²³

rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the [C]onstitution; and the [C]onstitution is superior to any ordinary act of the legislature; the [C]onstitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the [C]onstitution is to be considered, in court, as paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

122. I have made reference to these cases also because they demonstrate that judicial activism is not a fault of only the "elitist left," as Graglia laments, but a criticism that can be leveled at the conservatives as well. Graglia, *supra* note 105, at 298 ("[T]he effect of rulings of unconstitutionality over the past four decades has been to enact the policy preferences of the cultural elite on the far left of the American political spectrum."). If judicial activism is, as Professor Graglia asserts, "the practice . . . of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit," then the conservative Justices' invalidation of the application of minimum wage legislation to the states in 1976 was an example of judicial activism. *Id.* at 296.

123. GERALD GUNTHER, *LEARNED HAND, THE MAN AND THE JUDGE* 149 (1994).

It has been said by one of my colleagues, a district judge from Michigan, that judges themselves pose the most significant threat to the continued vitality of judicial independence.¹²⁴ Decisions that appear to be based upon a judge's value system, and not according to law, promote assaults on judicial independence. Such assaults have manifested themselves in various manners in recent years.

VII. CURRENT ASSAULTS ON JUDICIAL INDEPENDENCE

One way in which judicial independence has been threatened is through misleading criticism of particular decisions. There is, of course, an absolute First Amendment right to criticize any judge's decision. There is also a First Amendment right to use even intemperate language in calling attention to a ruling with which one disagrees. But the premise underlying the First Amendment—that a free and open exchange of ideas and information will produce the best decisions—can be frustrated by misinformed criticism of judicial decisions. Recently, bar associations have come to the defense of judges by setting up response groups whose responsibility is to provide, in Paul Harvey's words, "the rest of the story" when a decision has been subjected to misinformed or deliberately misleading criticism.

Judges, too, must bear responsibility by writing opinions that clearly express adherence to the discipline of legal reasoning in language that is understandable to the layperson. Care must be taken that, when precedent is overruled or a gap in the law is filled, the opinion is written in a way that assures both the litigants and the public that it accords proper respect to the principle of *stare decisis*, is justified by the discipline of legal reasoning and is rooted in the sources of law.

Legislative and executive leaders, however, should refrain from calling for a judge's resignation or threaten impeachment because of an isolated decision. Calls for impeachment or resignation, as we saw during 1996 when a federal judge in New York suppressed evidence, constitute political threats.¹²⁵ The implication is that if the judge does not decide the case favorably, the judge will lose his position. For nearly 200 years, the principle has been established that a particular decision is not the basis for removal of a judge. Calls for removal or impeachment based upon a single ruling needlessly create inter-branch fiction and, more importantly, serve to undermine public confidence in the judiciary.¹²⁶

124. See Gerald E. Rosen, *Judicial Independence in an Age of Political and Media Scrutiny, Remarks at the Thomas M. Cooley Law School Distinguished Brief Award Banquet* (July 19, 1997), reprinted in 14 T.M. COOLEY L. REV. 685, 692 (1997) (noting that judges must avoid becoming "super-legislators"):

125. See *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996) (granting motion to suppress evidence seized from automobile and post-arrest statements).

126. In *Bayless*, the judge in question eventually reversed his ruling on a motion for reconsideration. See *United States v. Bayless*, 921 F. Supp. 211, 217

A second area in which judicial independence is threatened is through the appointment process. Having nominees undergo a litmus test on judicial philosophy suggests that rulings will be consistent with promises extracted in the confirmation process or that judges are expected to decide matters in accordance with the predilections of those in power. The appointment process should, indeed, insure that those qualified by intellectual competence and temperament be appointed; but it should not be used to assure that only those having a certain philosophical point of view are confirmed.

A third way in which independence of the judiciary is threatened is the congressional control over the jurisdiction and organization of the federal courts. It has been reported that, between 1953 and 1968, more than sixty pieces of legislation were introduced in Congress to restrict federal court jurisdiction over particular matters.¹²⁷ For example, in response to *Baker v. Carr*¹²⁸ and *Reynolds v. Sims*,¹²⁹ which announced the one person, one vote rule, proposals were made in Congress to preclude federal courts from hearing cases seeking reapportionment of state legislatures.¹³⁰

Although these efforts were unsuccessful, more recently, Congress has passed laws that remove federal court consideration of certain matters that often present issues of constitutional dimension. In particular, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act bars judicial review of many executive agency actions respecting both legal and illegal aliens.¹³¹ For example, the Act provides that no federal court has jurisdiction to consider an executive agency order deporting an alien who has been convicted of an "aggravated felony."¹³²

(S.D.N.Y. 1996) (vacating prior decision). The implication that the threats of removal affected the judge's ruling is apparent.

127. See Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1220 n.86 (1984) (citing PAUL M. BATOR ET AL., HART AND WEXLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 360 (2d ed. 1973)).

128. 369 U.S. 186 (1962).

129. 377 U.S. 533 (1964).

130. See Wilfred Feinberg, *Constraining "The Least Dangerous Branch": The Tradition of Attacks on Judicial Power*, 59 N.Y.U. L. REV. 252, 267 (1984) (discussing *Reynolds v. Sims*).

131. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

132. See 8 U.S.C. § 1252(a)(2)(C) ("No court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having [an aggravated felony conviction]."); Matthew J. Droskoski, Casebrief, *Criminal Aliens Get Pinched: Sandoval v. Reno, AEDPA's and IIRIRA's Effect on Habeas Corpus Jurisdiction*, 45 VILL. L. REV. 711, 717-20 (2000) (examining alteration of judicial review after enactment of IIRIRA). The Third Circuit, however, has concluded that the statutory bar on judicial review does not foreclose habeas corpus jurisdiction under 28 U.S.C. § 2241 in the district courts; thus, an alien may seek judicial review of constitutional and federal law issues following removal orders, and judi-

In addition to restricting the federal courts' jurisdiction, Congress has passed laws that restrict their discretion to decide certain kinds of cases or issues. For example, the Sentencing Reform Act of 1984 has significantly constrained sentencing decisions.¹³³ Mandatory minimum sentencing laws turn judges into Jefferson's "mere machine" of the legislature, imposing sentences strictly prescribed by legislation. The Prison Litigation Reform Act, also passed in 1996, seriously restricts the relief that judges can afford for conditions of confinement that amount to cruel and unusual punishment.¹³⁴

This is not to suggest any criticism of these congressional policy choices. The legislation cited herein had broad public support. But congressional authority does not extend to the adjudication of cases. The pertinent question, therefore, is whether Congress is invading the judicial power vested by the Constitution in the Supreme Court and such inferior courts as are established by Congress. If Congress passes legislation that destroys the essential role of the federal courts, it is violating the separation of powers doctrine that underlies our constitutional government. For example, the Constitution's structure would be seriously compromised if Congress could enact a law and then immunize that law from constitutional judicial review.

From time to time, Congress has considered legislation that would ordain the result of a particular case. For example, under a recent legislative proposal, the judiciary would be required to interpret the First Amendment in such a manner so as to permit the posting of the Ten Commandments on government property.¹³⁵ This would be accomplished by declaring that the Tenth Amendment should be interpreted as leaving this choice to state governments.¹³⁶ The bill goes on to state that

cial review may extend to the issue of whether the alien should be classified as an "aggravated felon." See *Steele v. Blackman*, 236 F.3d 130, 132-33 (3d Cir. 2001) (finding second misdemeanor conviction for distribution of thirty grams or less of marijuana without remuneration was not "aggravated felony"); *Sandoval v. Reno*, 166 F.3d 225, 235 (3d Cir. 1999) (holding that district courts continue to have habeas jurisdiction over deportation orders on basis of commission of crimes listed in IIRIRA); see also *Droskoski*, *supra*, at 728-41 (examining Third Circuit's rationale in upholding habeas corpus jurisdiction).

133. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3742 (1994) and 28 U.S.C. §§ 991-998 (1994)).

134. See Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-66. The limitation on relief provisions are codified at 18 U.S.C. § 3626.

135. See Joel L. Thollander, Note, *Thou Shalt Not Challenge the Court? The Ten Commandments Defense Act as a Legislative Invitation for Judicial Reconsideration*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 205, 210 (2000) (discussing "Ten Commandments Defense Act"). In 1999, Representative Robert Aderholt of Alabama introduced the "Ten Commandments Defense Act" in Congress. H.R. 1501, 106th Cong. §§ 1201-1202 (1999).

136. See H.R. 1501, § 1202(a) ("The power to display the ten commandments on or within property owned or administered by the several states or political sub-

the courts shall exercise the judicial power in a manner consistent with the foregoing declarations.¹³⁷

Plainly, this is a direct invasion of the prerogative of the courts. In *Marbury v. Madison*, Justice John Marshall declared that "it is emphatically the province and duty of the judicial department to say what the law is."¹³⁸ Congress, therefore, should not pass legislation that tells the courts what a decision in a particular case must be.¹³⁹

While legislation that requires a particular result in a particular case clearly crosses the separation of powers line, congressional oversight of the structure and organization of the federal judiciary is appropriate. After all, funding for the judiciary comes from the general treasury of the United States. The potential for perniciousness in congressional exercise of its power over the organization and structure of the federal courts is present. To avoid constitutional crises arising out of congressional oversight of the judiciary, mutual restraint on both branches is necessary. That is, Congress should not exercise its authority in such a way as to impair judicial independence, and the judiciary should accept congressional oversight in a constructive spirit in order to preserve its institutional independence. As stated in the *ABA Report on an Independent Judiciary*:

If the courts are to make the most of limited resources, it is critically important that the historically amicable relationship between the first and third branches be maintained. The judiciary

divisions thereof is hereby declared to be among the powers reserved to the states respectively.").

137. *See id.* § 1202(b)(3) (directing courts to interpret First Amendment to allow posting of Ten Commandments on public property).

138. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

139. This principle was recognized during the Reconstruction Era. Congress had passed a law providing that individuals whose property was seized during the Civil War could recover the property or receive compensation for it upon proof that they had not aided the rebellion. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 130-31 (1871). The Supreme Court held that a presidential pardon fulfilled the statutory requirement for demonstrating that an individual had not supported the rebellion. *See id.* at 131-32. In response to frequent pardons issued by the President, Congress enacted a statute providing that a pardon was inadmissible as evidence in a claim for return of seized property. *See id.* at 133. The statute went on to provide that a pardon, without an express disclaimer of guilt, was actually proof that the party had aided the rebellion and would have denied federal courts jurisdiction over the claims. *See id.* at 133-34. In holding the statute unconstitutional, the Court stated:

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing one party to the controversy to decide in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not. . . . We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id. at 146-47.

is usually in a better position than Congress to determine the most efficient, expeditious and effective means to administer the courts; hence it behooves Congress to remain attentive to the judiciary's needs and concerns. By the same token, Congress is in a better position than the courts to structure the nation's policy preferences and fiscal priorities; hence it behooves the judiciary to be sensitive to those priorities when communicating its own needs and concerns.¹⁴⁰

Another way in which the independence of the federal judiciary is threatened is by control of judges' compensation. Although the Constitution guarantees that compensation may not be reduced, it affords no assurance that it will keep pace with inflation. The erosion of independence attending the real decline in pay attributable to inflation was recognized by Alexander Hamilton:

It will readily be understood that the fluctuations in the value of money and in the state of society, rendered a fixed rate of compensation [for judges] in the Constitution inadmissible. What might be extravagant today, might in half a century become penurious and inadequate.¹⁴¹

However, no provision in the Constitution was made to assure increases in compensation, with the matter being left to the discretion of the legislature and the veto power of the President.

The Ethics Reform Act of 1989¹⁴² was supposed "to create an automatic, irreversible COLA-granting mechanism for federal judges, contingent only upon the grant of a [cost-of-living adjustment ("COLA")] to the General Schedule [of federal employees]."¹⁴³ Since 1993, however, Congress and the President blocked COLAs in five of eight years.¹⁴⁴

Congressional failure to abide by commitments made in the 1989 Ethics Reform Act makes it difficult to retain and recruit the caliber of persons needed to discharge the important responsibilities of the federal judiciary. Chief Justice Rehnquist reports that during the 1990s, fifty-four federal district and appellate court judges left the bench, a substantial increase over similar periods of time.¹⁴⁵ Adequate compensation is neces-

140. Geyh, *supra* note 22, at 53.

141. THE FEDERALIST NO. 79, *supra* note 44, at 107.

142. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified at 5 U.S.C. §§ 101-505 (1994)).

143. *Williams v. United States*, 240 F.3d 1019, 1031 (Fed. Cir. 2001).

144. See William H. Rehnquist, *2000 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan., 2001, at 1, 3 (noting that federal judges received 2.3% increase in 1998, 3.4% increase in 2000 and 2.7% increase in 2001).

145. See *id.* at 2. A "white paper" presented to Chief Justice Rehnquist in February of 2001 by the ABA and the Federal Bar Association ("FBA") reported that, of the judges leaving the bench, thirty-one entered private practice. See A.B.A. & F.B.A. FEDERAL JUDICIAL PAY EROSION, A REPORT ON THE NEED FOR REFORM 15 n.46 (Feb. 2001) [hereinafter A.B.A. & F.B.A. Report].

sary also to assure that those attracted to the federal judiciary are the most fit to be chosen, and not only those most willing to serve.¹⁴⁶ The congressional failure to abide by commitments made in the 1989 Ethics Reform Act also results in inter-branch friction. Indeed, the validity of the legislation blocking pay raises in four out of five years is currently being litigated.¹⁴⁷

Chief Justice Rehnquist, in his 2000 Year-End Report on the Federal Judiciary, has called upon Congress to "abandon the approach to judicial salaries that puts off the inevitable increases until salaries have so eroded that substantial increases are necessary."¹⁴⁸ Specifically, he advocates restoration of the blocked COLAs, thereby increasing judicial salaries by 9.6%, and providing assurances that future Ethics Reform Act increases for the judiciary be automatic.¹⁴⁹

Establishing a consistent and routine method for compensating judges would lessen inter-branch friction and avoid the unseemly appearance of judges going to Congress with hat in hand to plead for fair compensation. The American Bar Association (ABA) and Federal Bar Association (FBA) have concluded that "the current salaries of Federal judges have reached such levels of inadequacy that they threaten to impair the quality and independence of the Third Branch."¹⁵⁰ Congress and the President bear a responsibility to ensure the independence of the Federal judiciary, and that responsibility is not discharged by subjecting judges to the vagaries of the political processes when it comes to establishing and maintaining a fair level of pay.

146. See Rehnquist, *supra* note 144, at 2 ("In order to . . . attract highly qualified and diverse federal judges . . . we must provide them adequate compensation."). When I was interviewed by an ABA representative in connection with my potential nomination to the Bench, I was asked whether I could afford the position in view of the fact that I would not be earning what I had made in private practice and I had three children who were not yet of college age. This was a legitimate question and a matter about which the interviewer had an understandable concern. The person who conducted the interview related to me that he had turned down an opportunity to go on the federal bench during the Carter Administration precisely because of the financial demands of paying for his children's education and the unsettled nature of compensation for judges.

147. See *Williams*, 240 F.3d at 1023 (reversing summary judgment granted to judges who filed class action seeking declaration that statutes barring payment of automatic adjustments to judges did not operate to prevent payment of adjustments due federal judges under Ethics Reform Act of 1989). Senior District Judge John Garrett Penn had ruled in favor of the judges' position that Congress could not block COLAs that the Ethics Reform Act of 1989 assured the federal judiciary whenever Congress decided to give General Schedule employees a COLA. See *id.* at 1023. The Federal Circuit, in a two-to-one decision, disagreed, holding that under *United States v. Will*, 449 U.S. 200 (1980), Congress could rescind a COLA so long as it acted before the COLA went into effect. See *id.* at 1039-40.

148. Rehnquist, *supra* note 144, at 2.

149. See *id.* at 3.

150. A.B.A. AND F.B.A. REPORT, *supra* note 145, at i.

VIII. CONCLUSION

Judicial independence has been threatened at various times during the course of the Republic's history. This article emphasized one period—the Jeffersonian challenge in the early 1800s. But there have been other times when the judiciary has been under attack, such as during the Jackson presidency and the Reconstruction Era.¹⁵¹ During the era of the Progressives in the early 1900s there were vigorous debates over the recall of judges and the popular recall of judicial decisions.¹⁵² Judicial decisions and judges were subject to harsh criticism at that time. In 1908, the ABA President, Jacob M. Dickinson, observed:

For a long time . . . judgments of courts . . . were received with the greatest of respect. . . . If decisions were publicly criticized, the criticism was generally temperate, addressed to particular questions, and was not of such a character as to break down in the minds of the people respect for the judiciary. . . . Judicial judgments are not accorded the same respect as formerly. Not a court, but the courts, are frequently and fiercely attacked . . . , and political parties of all creeds have bowed their heads in recognition of a discontent.¹⁵³

The consequence of such intemperate criticism, he warned, was to “destroy confidence in the courts” and “to make a subservient judiciary.”¹⁵⁴

One century after President Dickinson's observations, we are proceeding through a similar period in which misinformed criticism of decisions, calls for the impeachment and resignation of judges, retraction of grants of authority to the judiciary and micro-management of the judicial process may be combining to cause a subservient judiciary. If judicial independence is to be maintained, public confidence in the judiciary must be restored. It is the judiciary that is in the best position to promote respect for its decisions and confidence in its results.¹⁵⁵ Judges must remember that judicial independence is not an end, but only a means to an end—the mechanism chosen by the constitutional structure to insure the rule of law. Judges must therefore exercise the reciprocal obligation to indepen-

151. President Andrew Jackson, in an act of defiance of the Supreme Court's decision striking down the forced march of Native Americans from Georgia to Oklahoma, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), is reported to have said, “John Marshall has made his decision now let him enforce it.” Zemans, *supra* note 10, at 625 n.3. It is reported that “[i]n the fractious period following the Civil War, the President and Congress used the power to determine the size of the Court to achieve a specific result on a specific legal issue.” Burbank, *supra* note 19, at 322.

152. See Cox, *supra* note 8, at 577 (stating that progressives sought to limit judicial power by requiring unanimous votes by justices to invalidate legislation and providing for recall of judges by popular vote).

153. Geyh, *supra* note 22, at 65 (quoting *Address of the ABA President*, 33 REPORT OF THE FIRST ANNUAL MEETING OF THE A.B.A. 341 (1908)).

154. *Id.*

155. See Rosen, *supra* note 124, at 701 (advocating judicial restraint).

dence, and restrain themselves to rule according to law, in accordance with the discipline of legal reasoning, and not according to individual value preferences. The judiciary must value impartiality, thorough analysis and sound reasoning. It has been said that Judge Learned Hand believed strongly in judicial restraint, not because he thought the Constitution had to be applied by its literal terms, but, instead, "from a healthy mistrust of the idea that judges necessarily know better."¹⁵⁶ By exercising such restraint, the federal judiciary can preserve the judicial independence needed to make unpopular decisions that are sometimes essential to the preservation of the rule of law.

As observed in the *Report of the ABA Commission on Separation of Powers and Judicial Independence*, "a public that does not trust its judges to exercise sound, even handed, independent judgment, will look upon judicial independence—guaranteed by life tenure and an undiminished compensation—as a problem to be eradicated, rather than a virtue to be preserved."¹⁵⁷ Judicial restraint—by which I mean deciding cases in accordance with the discipline of legal reasoning, paying careful attention to the language of the statute or constitutional provision at issue, existing precedent and accumulated wisdom, coupled with that healthy distrust of the idea that judges must necessarily know better—is indeed the reciprocal obligation of judicial independence. By promoting an understanding that judicial independence exists to allow judges to decide cases according to law, the judiciary will insure the mutual respect, restraint and understanding of the other branches of government required to maintain equilibrium in our system of government.

156. Lewis F. Powell, Jr., *Foreword to* GERALD GUNTHER, *LEARNED HAND, THE MAN AND THE JUDGE*, at xii (1994).

157. A.B.A. COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, *An Independent Judiciary*, available at <http://www.abanet.org/govaffairs/judiciary/rappa.html>.